

CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

DEPARTMENT: Museum and Cultural Affairs Dept.

AGENDA DATE: 07/12/2011

CONTACT PERSON/PHONE: Sean McGlynn 541-4896

DISTRICT(S) AFFECTED: 1

SUBJECT:

A resolution that the City Manager be authorized to sign the attached Artist Service Agreement by and between the City of El Paso and artist Widgery Works, Inc., a Massachusetts corporation ("Artist") to design, fabricate and install public art to be located on the Mesa Corridor of the Rapid Transit System starting at the Downtown Transfer Center, 601 Santa Fe ST, in the amount of TWO HUNDRED AND FORTY THOUSAND AND 00/100 DOLLARS (\$240,000.00). (Districts 1 and 8)

BACKGROUND / DISCUSSION:

Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?

A public art project to be included in the Mesa Corridor Rapid Transit System to encourage the integration of art into the architecture of municipal structures for the City of El Paso. Artist Widgery Works, Inc., has been selected and approved to create and integrate a public artwork along the Mesa Corridor Rapid Transit System starting at the Downtown Transfer Center, 601 Santa Fe St. for a total of 12 Stations.

PRIOR COUNCIL ACTION

Has the Council previously considered this item or a closely related one?

N/A

AMOUNT AND SOURCE OF FUNDING:

How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?

Fund 27271

Class 55000

Dept 55260001

BOARD / COMMISSION ACTION:

Enter appropriate comments or N/A

N/A

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____

(Example: if RCA is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City Manager be authorized to sign an Artist Service Agreement by and between the City of El Paso and Widgery Works, Inc., a Massachusetts corporation (“Artist”), to design, fabricate, transport and install public art to be known as the Mesa Corridor Rapid Transit System Public Art Project in the amount of TWO HUNDRED FORTY THOUSAND AND NO/100 DOLLARS (\$240,000.00).

ADOPTED this ____ day of _____, 2011.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Kristen L. Hamilton
Assistant City Attorney

Sean P. McGlynn, Director
Museums and Cultural Affairs Department

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

ARTIST SERVICE AGREEMENT

THIS Artist Service Agreement (“Agreement”) is entered into as of the date written on the signature page (“Effective Date”) between the following Parties:

CITY: City of El Paso, Texas,
 a Texas municipal corporation, and

ARTIST: Widgery Works, Inc., a Massachusetts corporation

RECITALS

WHEREAS, the City has determined that it requires the assistance of Artist to design, fabricate, transport and install public art to be known as the Mesa Corridor Rapid Transit System Public Art Project (the “Artwork”), at the site located at on the Mesa Corridor of the Rapid Transit System starting at the Downtown Transfer Center, 601 Santa Fe St, District 8 and will end at the Westside Transfer Center at 7535 Remcon Circle, District 1, and the art will be incorporated into the 12 proposed stations for the corridor as listed on Exhibit “A”, El Paso, El Paso County, Texas referenced herein as the “Site”; and

WHEREAS, Artist has been approved by the Public Art Committee (“PAC”) and the Museums and Cultural Affairs Advisory Board (“MCAAB”), as having the experience and expertise in outdoor public art and is qualified to provide the services required by the City.

FOR THESE REASONS, AND IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

ARTICLE ONE
Contractual Relationship

1.1 The City agrees to engage Artist, and Artist hereby agrees to perform services as required under this Agreement. The selection of Artist was based on the qualifications of Artist, who possesses the skills to render and design the Artwork and who shall design, fabricate, transport and install the Artwork.

1.2 Artist is an independent contractor. Except as may be expressly and unambiguously provided in this Agreement, no partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the Parties or any of their officers, employees, agents or contractors.

1.3 Artist shall not receive any compensation or benefits from the City, other than as expressly set forth in this Agreement or in a subsequent written agreement that is signed by both parties.

1.4 Artist does not have, and will not attempt to assert, the authority to make commitments for or to bind the City to any obligation other than the obligations set forth in this Agreement or in any subsequent written agreement that is signed by both parties.

ARTICLE TWO

Scope of Services

2.1 Artist's Obligations

- 2.1.1 Artist shall abide by all U.S. Federal, State and Local laws during the design, fabrication, transportation and installation of the Artwork as it relates to the performance of this Contract including, but not limited to, all laws regarding taxation and immigration.
- 2.1.2 Artist shall perform all services ("Services") and furnish all supplies, materials and/or equipment as necessary for the off-site and on-site design, fabrication, transportation and installation of the Artwork in accordance with the specified schedule and as further described herein below and in EXHIBIT "B" including collaboration with the City Engineering Department, City Museums and Cultural Affairs Department, and the architect and architects subcontractors, engaged by the City to perform professional services for the project "Mesa Corridor Rapid Transit System Public Art Project", (herein after, "Architect"). Services shall be performed in a professional manner and in strict compliance with all terms and conditions in this Agreement.
- 2.1.3 Artist shall determine the expression, design, dimensions and materials of the Artwork, subject to review and acceptance by the City, by and through its Museums and Cultural Affairs Department ("MCAD"), the City Mass Transit Department ("Sun Metro") and the City Engineering Department as set forth in this Agreement. All aspects of Artist's Services shall be coordinated with MCAD's Public Arts Coordinator.
- 2.1.4 Artist will develop the design the corresponding budget and the construction documents described in Sections 2.3 and 2.4 of this Agreement. The developed design shall include a description of all materials and products utilized in the Artwork and the required routine care and upkeep involved.
- 2.1.5 At the discretion of the City, Artist shall provide necessary information as reasonably requested by MCAD for public information meetings or shall attend such meetings as reasonably requested by MCAD with the general public, design and construction coordination meetings with MCAD, Sun Metro the City Engineering Department, architect, general contractor, landscape architect and other parties, as appropriate, to communicate about the Artwork and to ensure appropriate integration and/or installation of the Artwork. Attendance may be by phone conference at the discretion of MCAD.

- 2.1.6 Artist shall complete all off-site fabrication by the scheduled installation phase as provided in Section 2.5 of this Agreement.
- 2.1.7 Artist shall complete the installation of the Artwork and shall provide insurance during the transportation for the value of the Artwork. Artist shall be liable for loss or damage to the Artwork during transportation of the Artwork until it is installed, inspected by City and accepted as provided herein.
- 2.1.8 Artist shall be responsible for compliance with all applicable laws and regulations, including but not limited to zoning or environmental regulations.
- 2.1.9 Artist shall secure any and all required licenses, permits and similar legal authorizations at Artist's expense as may be necessary for installation of the Artwork at the site.
- 2.1.10 Artist shall provide a list of all subcontractors along with a copy of the agreement between the Artist and each subcontractor, prior to each subcontractor commencing work on the Artwork. As described in Section 4.2.5, final payment from the City for the Artwork shall be contingent upon Artist providing to MCAD a copy of the release of lien from Artist and add subcontractors to ensure that full payment has been made by Artist to each subcontractor.
- 2.1.11 Artist shall provide photographic documentation of the Artwork upon completion of same as per Section 2.7.3.
- 2.1.12 Artist shall be available with reasonable advance notice for meetings, ceremonies and the like, as necessary.
- 2.1.13 The Artist shall provide and install a plaque on or near the Artwork containing a credit to the Artist and in the following form: Artist's name, title of Artwork and date of installation. The plaque is subject to review and acceptance by MCAD in conjunction with installation as referenced in Section 2.7.2.

2.2 City's Obligations

- 2.2.1 The City shall be responsible for providing Artist, at no expense to the Artist, copies of existing designs, drawings, reports, list of required permits, and other existing relevant data, if any, which is needed by Artist in order to perform.
- 2.2.2 The City shall inform Artist of any limitations to the Artwork, during any stage of its design, fabrication or transportation to the Site, imposed by zoning or environmental laws and/or regulations, or any other laws or regulations.
- 2.2.3 The City shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 2.3.2 of this Agreement

- 2.2.4 The City shall prepare the Site in accordance with the specifications detailed in the approved design concept in Section 2.3.2 of this Agreement. Such Site preparation shall include clearing, grubbing, excavation, backfill, compaction and subsurface infrastructure. The City will be responsible for all expenses, labor and equipment to prepare the Site for the timely transportation and installation of the Artwork. The City shall begin site preparations once the City approves the design as in Section 2.3 of this Agreement and shall complete the site preparations as provided in Section 2.7 of this Agreement or shall contact the Artist in writing informing Artist of any delays.
- 2.2.5 MCAD shall be responsible for leading Artist through the required review process. MCAD shall be responsible for organizing and scheduling meetings with review entities, (PAC, CAAB, etc.) and for providing Artist written instructions for the materials required at such meetings.

2.3 Design

2.3.1 Concept/Schematic Design

- 2.3.1.1 The Pre-Design concept is attached hereto as Exhibit “C”. Within 15 days of the execution of this Agreement, Artist shall: commence work and coordinate the following research (“Research Phase”) meet with Public Art Coordinator to determine project goals and objectives and to review criteria, conditions, and budgets; meet with Architect and determine possibilities for integrating architecture with public art components; evaluate the key opportunities for artist participation; visit site and identify possible connections from immediate project site and larger context of El Paso.
- 2.3.1.2 Within 45 days of the execution of this Agreement, Artist shall submit to MCAD two preliminary designs which will identify recommendations for artwork opportunities, detail locations, materials, form, color, shape and content; develop conceptual schemes for the design; prepare draft conceptual renderings meant to express the design for internal review among the artist, Architect and Public Art Coordinator.
- 2.3.1.3 Within 30 days of receiving the two Conceptual Designs, MCAD shall notify Artist whether City approves outright, with conditions, or rejects them. If the City disapproves or requires revisions to the Conceptual Design, MCAD will submit to Artist in writing the reasons for such disapproval or requested revisions. In such event, Artist shall submit a revised design (“Revised Conceptual Design”) within 30 days after the MCAD has notified Artist of the City’s disapproval or requested revisions. Artist will not be paid an additional fee for the Revised Conceptual Design. Once the Conceptual Design is approved, City through MCAD shall give Artist written notice to proceed to develop the design “Design Development.”

2.3.1.4 Following the notice provided according to paragraph 2.3.1.1, Artist shall develop the design to prepare the Design for the Artwork, showing the details of the Artwork to include indication of form, scale, and proposed materials which shall be submitted within 30 days. The Design shall include proposed project names, information of structural considerations, surface integrity, permanence and protection against theft, vandalism, and weather conditions a description of the method by which the Artwork is to be fabricated and installed, a description of any operational, maintenance and preservation requirements for the Artwork, a description of the placement of the Artwork at the Site and any site preparations that may be required by the City including, but not limited to, any changes or modifications to any utility system or structure of the Site as necessary. During the Artwork's design development phase, Artist shall also consult with the City Engineering Department, the Architect, the MCAD public art coordinator and representatives of the community and consider their input and concerns. Artist must also integrate feedback from the Architect and Public Art Coordinator into final design schemes, present a formal proposal to Public Art Committee, draft budget of estimated material, installation costs, design fee, and preparation of construction documents, prepare measured drawings to scale indicating materiality and project dimensions, prepare a presentation of the design scheme as either digital files or printed boards as requested by public art administrator, included will be images suitable for internal or external presentation by the Public Art Coordinator.

2.3.1.5 The Design which will be incorporated into the Architects work, must provide sufficient detail to permit the City to assure compliance with applicable local, state or federal laws, ordinances and/or regulations. The Artist shall attach to the Design a detailed budget for the design, fabrication and installation of the Artwork, as described in EXHIBIT "D" of this Agreement. The budget must cover all costs related to the design, fabrication and installation of the Artwork, including itemized costs for materials, off-site fabrication costs, costs for labor of assistants, Artist's time for coordination, fabrication, supervision and installation itemized estimated General Contractor and sub-contractor costs, permits or other fees, insurance, studio and operation expense, consultants' fees, communications, Artist's travel, transportation of the Artwork to site, itemized installation costs and any other estimated cost for the entire project.

2.3.1.1

2.3.2 Approval

2.3.2.1 Within 30 days after the Artist submits the finalized Design, MCAD shall notify Artist whether it approves or disapproves of the Design. MCAD shall have discretion in approving outright or with conditions, or rejecting the Design. The City shall notify Artist of any revisions to the Design as are

necessary for the Artwork to comply with any applicable laws, ordinances and/or regulations and other reasons including, but not limited to, ensuring the physical integrity of the Artwork or its installation at the Site. If agreed upon by both parties, such revisions will become a part of the accepted Design.

2.3.2.2 If the City disapproves of the Design, MCAD will submit to Artist in writing the reasons for such disapproval. In such event, Artist will submit a revised design (“Revised Design”) within 30 days after the MCAD has notified Artist of the City’s disapproval. Artist will not be paid an additional fee for the Revised Design.

2.3.2.3 The Revised Design will reflect changes made to address the City’s stated reasons for disapproval, as well as any adjustments in the budget or schedule that may be necessary. The City shall notify Artist in writing whether it approves or disapproves of the Revised Design within ten (10) days after Artist submits the Revised Design.

2.3.2.4 If Artist refuses to revise the Design pursuant to Section 2.3.2.2, or if Artist fails to adequately revise the Design in the judgment of the City, this Agreement shall terminate and the parties shall be under no further obligation to each other as of the date of such termination. The effective date of termination shall be the date the City submits its written disapproval of the Revised Design to Artist. The MCAD shall submit to Artist a written termination notice with the disapproval. The termination notice shall advise Artist that this Agreement has been terminated pursuant to this Article. The termination notice shall notify Artist that Artist is entitled to retain the compensation paid prior to the termination date, and that the Parties are under no further obligation to each other. The termination notice shall confirm that the Artist shall retain ownership of all Designs, revised Designs and renderings thereof submitted hereunder.

2.3.3 Final/Construction Documents

2.3.3.1 Artist shall include in the design documents design drawings detailing every physical feature of the construction of the Artwork and its integration with the Site. These drawings and supplementary documents shall indicate any issues involved in the construction, integration and maintenance of the Artwork, as well as any third party subcontractor needed to work on the project.

2.3.3.2 Where appropriate, Artist, through MCAD, shall present such drawings to the City’s Engineering Department for review by an engineer and for certification that the Artwork will be of adequate structural integrity.

2.3.3.3 If the City deems it appropriate, the City may present the Design to a qualified conservator, who will make recommendations on the maintenance of the

Artwork and Artist shall provide a written copy of the conservator's recommendations to MCAD.

2.4 Budget, Construction Schedule and Progress Reports

2.4.1 Budget

2.4.1.1 Artist shall prepare a budget, which shall include all goods, services and materials, with such costs itemized ("the Budget"). The Budget shall be submitted to and approved by the City as part of the Design, and shall be consistent with the budget outline attached to this Agreement as EXHIBIT "D".

2.4.1.2 Calculation of the Budget will take into consideration the possible inflation of service and material costs between the date of execution of this Agreement and the anticipated completion date.

2.4.1.3 Artist shall keep a log of Artist's project hours and shall retain all original receipts pertaining directly to the design and oversight of fabrication and installation of the Artwork.

2.4.1.4 If Artist incurs costs in excess of the amount listed in the budget, Artist shall pay such excess from Artist's own funds unless Artist previously obtained approval for such costs from the City. Without said prior approval for such costs from the City, should Artist incur costs in excess of the amount listed in the budget, Artist shall not seek additional funds from the City.

2.4.1.5 Artist's books and other records related to the improvements shall be available for inspection by the City upon written request, and shall retain them for 5 years.

2.4.2 Schedule of Completion

2.4.2.1 Artist shall notify MCAD of the tentative schedule for the Design, fabrication delivery and installation of the Artwork to the Site, including a schedule for the submission of progress reports and inspections if any (the "Schedule"). MCAD shall have the right to require any submitted schedule to be coordinated with the City in conjunction with any other agreements for the Mesa Corridor Rapid Transit System Public Art Project. MCAD shall approve the tentative schedule before it shall take effect. The Schedule may be amended by written agreement of both parties.

2.5 Fabrication Stage

- 2.5.1 Within 140 days of MCAD's notice to proceed, Artist shall fabricate the artwork in substantial conformity with the Design or the Revised Design. Artist may not deviate from the approved Design without written approval of the City.
- 2.5.2 Artist shall take reasonable measures to protect or preserve the integrity of the Artwork such as the application of protective or anti-graffiti coatings, unless waived by the City. If the Artwork is being constructed on-site, Artist shall avoid creating nuisance conditions arising out of Artist's operations. Prior to requesting authorization to transport and install the Artwork, Artist is required to provide MCAD with a list of all workers or subcontractors and equipment to be used along with the hours of operation and the scope of work to be performed on site. All additional workers or subcontractors must provide proof of insurance prior to entering the site.
- 2.5.3 The City shall have the right to review the Artwork at reasonable times during the fabrication thereof upon reasonable notice to Artist.
- 2.5.4 If the City, upon review of the Artwork, determines that the Artwork does not conform to the Design or Revised Design, the City reserves the right to notify Artist in writing of the deficiencies and that the City intends to withhold the next payment installment ("Deficiency Notice").
- 2.5.5 Within ten (10) days of the written Deficiency Notice described hereinabove, or during such timeframe as agreed upon by the parties, Artist will promptly cure the City's objections and shall notify MCAD in writing of completion of the cure. The City shall promptly review the Artwork, and upon approval shall release the next payment installment pursuant to Section 4.2 herein if Artist has completed all work required in order to receive that payment installment. If Artist disputes the City's determination that the Artwork does not conform, Artist shall promptly submit reasons in writing to MCAD within ten (10) days of the City's prior notification to the contrary. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether Artist has complied with the terms of this Agreement shall remain with the City.
- 2.5.6 Artist shall notify MCAD in writing immediately once fabrication of the Artwork has been completed.
- 2.5.7 The City shall inspect the Artwork within thirty (30) days after receiving notification pursuant to Section 2.5.6, prior to transportation and delivery, to determine that the Artwork conforms with the Design and give final approval of the Artwork. The City shall not unreasonably withhold final approval of the fabricated Artwork. In the event that the City does withhold final approval, MCAD shall submit the reasons for such disapproval in writing within ten (10) days of examining the fabricated Artwork. Artist shall then have thirty (30) days from the date of MCAD's notice of the disapproval to continue consultations with the City as the necessary adjustments are made to the fabricated Artwork in accordance with such writing.

- 2.5.8 MCAD shall promptly notify Artist of any delays at the Site impacting installation of the Artwork. Artist shall be required to inspect documents outlining and describing the Site Plan prior to the transportation and delivery of the Artwork and shall notify the MCAD of any adverse Site conditions that shall impact the installation of the Artwork that are in need of correction. Artist shall be entitled to additional time to perform this Agreement due to delays caused by the City but shall not be entitled to additional compensation for such delays.

2.6 Changes to Design

- 2.6.1 Prior to the execution of any change in the approved Design, Artist shall present proposed changes in writing to the City for further review and approval. Artist must provide a detailed description of any significant changes in the artistic expression, design, dimensions and materials of the Artwork that are not in substantial conformity with the already approved design. Such notice will also include a detailed description of any additional costs that may be incurred or changes in the Budget. A significant change is any change that materially affects installation, scheduling, site preparation or maintenance.
- 2.6.2 If the City approves the changes, the City shall promptly notify Artist in writing. If the City disapproves of the changes, MCAD shall promptly notify Artist in writing and Artist shall continue to consult with the City regarding the fabrication of the Artwork in substantial conformity with the approved Design.
- 2.6.3 Artist's fee shall be equitably adjusted for any increase or decrease in Artist's cost of, or time required for, performance of any services under this Agreement as a result of revisions made to the Design under Section 2.6.1. Any claim of Artist for adjustment under this paragraph must be asserted in writing within fifteen (15) days after the date of the revision by Artist.

2.7 Transportation, Delivery and Installation

- 2.7.1 Within 45 days of the City's final approval of the fabricated Artwork, as being in conformity with the Design, Artist shall transport, deliver, complete any on-site fabrication and install the completed Artwork to the Site in accordance with the schedule provided for in Section 2.4.2.
- 2.7.2 Artist will coordinate closely with the City to ascertain that the Site is prepared to receive the Artwork. Artist must notify MCAD of any adverse conditions at the Site that would effect or impede the installation of the Artwork. Artist shall confer with City to ensure timely coordination with City's Construction team. Artist may not install the Artwork until authorized to do so by MCAD. Artist shall be present to supervise any on-site fabrication and the installation of the Artwork. Artist shall not interfere with the City's periodic Site visits to verify the percent completion and the city's inspection of the plaque.

- 2.7.3 Within fifteen (15) days after installation of the Artwork, Artist shall furnish MCAD with a full written narrative description of the Artwork and an Artist Statement to explain, justify and contextualize the Artwork to help the viewer understand the most important aspects of the Artwork, the techniques used to make it and the primary sources of inspiration. Artist shall also furnish MCAD with the following photographs of the Artwork as installed: A set of three digital, 300 dpi, JPG files, of the Artwork, provided to MCAD on a CD ROM. Photographs must be labeled with the name of the Artwork, the date upon which the photograph was taken, and the viewpoint from which the photograph was taken.
- 2.7.4 Within fifteen (15) days completion of the installation of the Artwork, Artist shall provide MCAD with written instructions for the appropriate maintenance and preservation of the Artwork along with product data sheets for any material or finish used. The Artwork must be durable, taking into consideration that the Site is an unsecured public space that may be exposed to elements such as weather, temperature variation, and considerable movement of people and equipment. Artist must ensure that all maintenance requirements will be reasonable in terms of time and expense. The City is responsible for the proper care and maintenance of the Artwork.

2.8 Approval and Acceptance

- 2.8.1 The Artist shall notify MCAD in writing when the Services have been completed in substantial conformity with the Design to include Design, Fabrication, Delivery and Installation.
- 2.8.2 MCAD shall promptly notify Artist of its final acceptance of the Artwork within thirty (30) days after Artist submitted written notice pursuant to Section 2.8.1 above. The effective date of final acceptance shall be the date MCAD submits written notice to Artist of its final acceptance of the Artwork. The final acceptance shall be understood to mean that the City acknowledges completion of the Artwork in substantial conformity with the approved design, and that the City confirms that all Services as required of both Parties by this Agreement have been completed. Title to the Artwork passes to the City upon final acceptance by the City and final payment by the City to Artist.
- 2.8.3 If the City disputes that all the Services have been performed, the City shall notify Artist in writing of those services that Artist has failed to perform within thirty (30) days after Artist submitted written notice pursuant to Section 2.8.1 above. The City shall make reasonable efforts to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.
- 2.8.4 If Artist disputes the MCAD's determination that not all Services have been performed, the Artist shall submit reasons in writing to MCAD within ten (10) days of the City's prior notification to the contrary. The City shall make reasonable efforts

to resolve the dispute with Artist in good faith. However, final determination as to whether all Services have been performed shall remain with the City.

- 2.8.5 Upon the resolution of any disputes that arise under paragraphs (3) and (4) of this section, MCAD shall notify Artist of its final acceptance of the Artwork pursuant to paragraph (2).

ARTICLE THREE

Term and Termination

3.1 Term. This Agreement will be in effect for a two- (2) year period from the Effective Date, or until terminated earlier as provided for herein.

3.2 Unilateral Termination. The City may unilaterally terminate the Agreement with or without cause at any time, such termination effective immediately upon written notice to Artist as provided herein. In the event the City terminates this Agreement, Artist shall be entitled to compensation for Services in accordance with the Payment Schedule as described hereinbelow in Article 4, with the understanding that the final 15% of the contract price may be withheld unless 100% completion of the Artwork is provided by Artist and is accepted by the City.

3.3 Termination by Mutual Consent. The Parties may terminate the Agreement by mutual consent upon such terms as they may agree in writing.

3.4 Time of Performance– Force Majeure. The Services shall be undertaken and completed as appropriate to carry out the purposes of this Agreement. Except as otherwise provided, neither Artist nor the City shall be liable to the other for any delay in, or failure of performance of any requirement contained in this Agreement caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. “Force majeure” includes those causes generally recognized under Texas law as constituting impossible conditions.

ARTICLE FOUR

Fees and Expenses

4.1 Fee. Artist agrees to perform the Services contemplated hereunder for a total fee of TWO HUNDRED FORTY THOUSAND AND NO/100 DOLLARS (\$240,000.00). Artist in accordance with the Payment Schedule described as follows.

4.2 Payment Schedule.

- 4.2.1 Within thirty (30) days of the City’s receipt of an invoice, City will pay to Artist THIRTY SIX THOUSAND AND NO/100 DOLLARS (\$36,000.00), which represents 15% for completion of the development of the conceptual design phase and MCAD’s approval pursuant to Section 2.3.1.

- 4.2.2 The City agrees to pay Artist an additional FORTY EIGHT THOUSAND AND NO/100 DOLLARS (\$48,000.00), which represents 20% of the total cost, within thirty (30) days of receipt by the City of an itemized statement from the Artist showing completion of the Design Development and Construction Documents and MCAD's approval pursuant to Section 2.3.1.
- 4.2.3 The City agrees to pay Artist an additional SIXTY THOUSAND AND NO/100 DOLLARS (\$60,000.00), which represents 25% of the cost, within thirty (30) days of an itemized statement from Artist showing completion of 50% of the fabrication and MCAD's approval that this portion of the fabrication is complete.
- 4.2.4 The City agrees to pay Artist an additional SIXTY THOUSAND AND NO/100 DOLLARS (\$60,000.00), which represents 25% of the cost, within thirty (30) days of an itemized statement from Artist showing completion of 100% of the fabrication stage and MCAD's approval pursuant to Section 2.5.
- 4.2.5 The City agrees to pay Artist and additional THIRTY SIX THOUSAND AND NO/100 DOLLARS (\$36,000.00), which represents 15% of the cost, within thirty (30) days of receipt by the city of an itemizes statement of completion of 100% of the Services rendered under this Agreement, subject to a positive inspection and acceptance by MCAD of the Artwork and said Services. MCAD's acceptance at this stage shall not be granted unless the Artist provides to MCAD the written instructions for the maintenance and preservation of the Artwork as stated hereinabove in Sections 2.7.3 and 2.7.4.

ARTICLE FIVE

INSURANCE AND INDEMNIFICATION PROVISIONS. Artist agrees to provide the following as a condition of the Agreement:

5.1 LIABILITY INSURANCE. Artist shall provide public liability insurance for personal injuries and death growing out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause.

- 5.1.1 Artist is required to purchase liability insurance on behalf of the City or, alternatively, may name the City as an additional insured on the policy of general liability insurance referenced above. Such insurance shall provide coverage for any alleged acts or omissions of the City, its agents, employees or independent contractors, alleged or asserted by any individual, in connection with the performance of this Agreement. Certificate of Insurance should be on behalf of the City of El Paso, 2 Civic Center Plaza, El Paso, Texas 79901.
- 5.1.2 Artist shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all

claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and contractors, its officers, agents, servants or employees.

- 5.1.3 No Services shall be provided by the City until Artist files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the Term of this Agreement shall be grounds for cancellation of this Agreement.

- 5.2 **INDEMNITY.** As a condition of this Agreement, Artist or its insurer shall **INDEMNIFY, DEFEND AND HOLD** the City, its officers, agents and employees, **HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE,) INCLUDING BUT NOT LIMITED TO ALL JUDGMENTS, SETTLEMENT AMOUNTS, ATTORNEYS' FEES, COURT COSTS AND EXPENSES INCURRED IN THE INVESTIGATION, HANDLING, DEFENSE AND LITIGATION OF ANY CLAIM OR SUIT, INCLUDING BUT NOT LIMITED TO ANY CLAIM OR SUIT FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON REGARDLESS OF THE MERITS OF OR OUTCOME OF SUCH CLAIM OR SUIT ARISING OUT OF OR RELATED TO THIS AGREEMENT. THIS INDEMNIFICATION PARAGRAPH SHALL APPLY EVEN WHERE SUCH BODILY OR PERSONAL INJURY, ILLNESS, LOSS OF SERVICES, PHYSICAL OR MENTAL IMPAIRMENT TO OR DEATH OF ANY PERSON, OR FOR DAMAGE OR DESTRUCTION TO ANY PROPERTY RESULTS FROM OR INVOLVES NEGLIGENCE OR ALLEGATIONS OF NEGLIGENCE ON THE PART OF THE CITY, ITS OFFICERS, AGENTS OR EMPLOYEES.** Without modifying the conditions precedent for preserving defenses, asserting claims or enforcing any legal liability, against the City as required by the City Charter or any law, the City shall promptly forward to Artist every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Artist shall 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as Artist may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. Artist shall pay all judgments in actions defended by Artist pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Artist, and premiums on any appeal bonds. The City, at its election shall have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The City shall not be responsible for any loss of or damage to Artist's property from any cause.

ARTICLE SIX

Copyright

6.1 The issue of copyright shall be treated in accordance with applicable law and City ordinances.

6.2 The City shall have absolute, unrestricted rights incidental to its full ownership of the final artistic work to alter, change, modify, destroy, remove, move, replace, transport, or transfer in whole or in part, the final artistic work when the City deems necessary within its discretion in order to exercise the City's powers and responsibilities in regard to public works and improvements, in furtherance of the City's operations or for any other good cause. The Artist may retain copyright and other intellectual property rights in and to the final design and the final artistic work itself. The Artist shall grant to the City a perpetual, irrevocable license to graphically depict or display the final artistic work for any non-commercial purpose whatsoever.

6.3 The City acknowledges that Artist is retaining the copyright of the Artwork. Artist will be responsible for registering with the United States Register of Copyrights, a copyright in the Artwork in the Artist's name, at Artist's expense. The City shall not be responsible for the payment of any royalties to the Artist who created the Artwork, through any activities of the City or any third party.

6.4 Artist agrees that it is selling, transferring and releasing to the City full and exclusive right to the project name Mesa Corridor Rapid Transit System Public Art Project. Artist further agrees to cease and desist from using the project name Mesa Corridor Rapid Transit System Public Art Project for future commercial use. The City agrees that Artist may use the name Mesa Corridor Rapid Transit System Public Art Project for historical reference and non-commercial purposes.

6.4.1 The non-commercial use of the Mesa Corridor Rapid Transit System Public Art Project project, including the name and reproduction of the images of the Artwork by Artist, shall not require the prior written consent of the City. Non-commercial uses of the Artwork include, but are not limited to, publication of the Artwork in order to show Artist's body of work, or publication or reproduction of the name of the project or the Artwork in a pamphlet or brochure or other historical documentation for Artist's archival purposes. All other parties shall request the City's consent to use the Mesa Corridor Rapid Transit System Public Art Project project name and/or reproduce the images of the Assets.

6.4.2 The parties agree that the current project name "Mesa Corridor Rapid Transit System Public Art Project" may change during the term of this Agreement. Said name change must occur in writing and be approved in accordance with the provisions of Section 2.3.2.1. A formal amendment to this Agreement shall not be necessary, but the City Clerk's Office must have on file the agreed to name change. Should the name change from "Mesa Corridor Rapid Transit System Public Art Project", all provisions of this Agreement related to the name "Mesa Corridor Rapid Transit System Public Art Project" shall apply to the new project name, including, but not limited to, this Article Seven.

ARTICLE SEVEN

General Administrative Provisions

7.1 Governmental Function. Artist expressly agrees that, in all things relating to this Agreement, the City is performing a governmental function, as defined by the Texas Tort Claims Act. The Parties hereby agree that the City enters into this Agreement in its capacity as a governmental entity for the purpose of performing a governmental function.

7.2 City Not Obligated to Third Parties. The City shall not be obligated or liable hereunder to any person other than Artist.

7.3 Waiver/Modification of Agreement. No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless provided as a written amendment hereto signed and approved as provided herein. No evidence of any waiver or modification shall be offered or received in evidence of any proceeding arising between the Parties out of or affecting this Agreement, or the rights or obligations of the Parties under this Agreement, unless such waiver or modification is in writing as hereinabove described. The Parties further agree that the provisions of this Section 8.3 cannot be waived.

7.4 Complete Agreement. This Agreement constitutes and expresses the entire agreement between the parties hereto in reference to the Services described herein, and in reference to any of the matters or things herein provided for, or hereinbefore discussed or mentioned in reference to such Services, all promises, representations and understanding relative thereto herein being merged.

7.5 Severability. Every provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Agreement.

7.6 Choice of Law. It is the intention of the Parties that this Agreement be construed in accordance with and under the laws of the State of Texas.

7.7 Venue. Venue shall be in the County of El Paso, Texas.

7.8 Compliance with Law. Artist shall comply with all Federal, State and local laws and ordinances applicable to the Services described herein.

7.9 Place of Performance. For the purposes of this contract the place of performance is the City of El Paso, County of El Paso, Texas.

7.10 Notice. Any notices required under this Agreement shall be sufficient if sent by Certified Mail, Return Receipt Requested, postage prepaid, to the City or Artist at the following addresses:

CITY: City of El Paso
ATTN: City Manager
2 Civic Center Plaza
El Paso, Texas 79901-1196

CITY: City of El Paso
Director, Museums and Cultural Affairs Department
2 Civic Center Plaza
El Paso, Texas 79901-1196

ARTIST: Widgery Works, Inc.
P.O. Box 400452
Cambridge, MA 02140

Changes may be made to the names and addresses noted herein through timely written notice to the other party.

7.11 Successor and Assigns. This Agreement shall be binding on the City and Artist, their successors and assigns. Neither party may assign, sublet or transfer its interest in this Agreement without the written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any principal or agent of the City.

7.12 Captions. The captions of this Agreement are for informational purposes only and shall in no way affect the substantive terms or conditions of this Agreement.

7.13 Warranty of Capacity to Execute Agreement. The people signing this Agreement on behalf of the parties warrants that he/she has the authority to do so and to bind the party for which he/she has authority to sign this Agreement and all the terms and conditions contained herein.

7.14. Binding Effect. Each person signing below represents that he or she has read this Agreement in its entirety; understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

IN WITNESS WHEREOF the parties hereto have executed this Agreement at El Paso, Texas effective as of the first date appearing heretofore.

(SIGNATURES APPEAR ON FOLLOWING PAGE)

SIGNED this _____ day of _____, 2011.

CITY OF EL PASO

Joyce A. Wilson
City Manager

ARTIST:

Widgery Works, Inc.

By: _____

Title: _____

APPROVED AS TO FORM:

Kristen L. Hamilton
Assistant City Attorney

APPROVED AS TO CONTENT:

Sean P. McGlynn, Director
Museums and Cultural Affairs Department

EXHIBIT “A”

Mesa Corridor Rapid Transit System Public Art Project

LIST OF STATION LOCATIONS

On following page

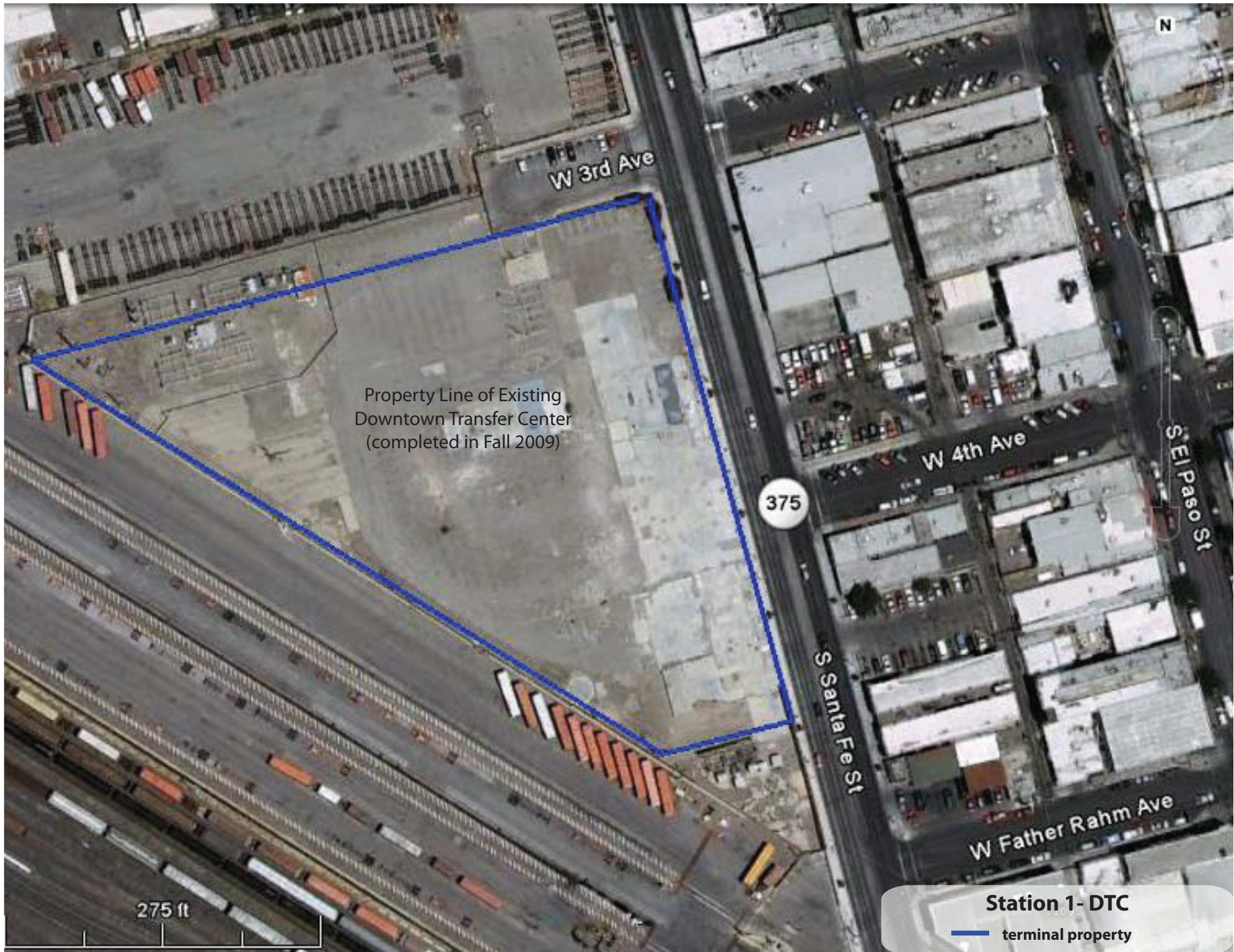
MESA BRT STATION LOCATIONS

OUTBOUND

Station as in AA	Proposed Location if Different From AA	Far, Near or Mid-block	Size of Station	Recomm ended in AA	Notes
DTC (Santa Fe)	Location will be inside DTC parking area. Cannot be against south wall due to electrical easement (per			NA	
Franklin	Replace existing bus stop with BRT			Yes	
Oregon - Rio Grande	at existing bus stop	far side		Yes	
Oregon - Hague	existing bus stop	near side		Yes	watch out for fire exit door
Oregon at Glory Road	on Oregon	near side		Yes	Does Sun Metro want regular BRT station? Does Sun Metro want infrastructure?
Sun Bowl/Mesita		far side		Yes	verify ROW lines - very narrow
Executive	existing bus stop in front of Coney Island	far side		Yes	verify ROW lines
Argonaut		far side		Yes	may request that TxDOT close driveway on Mesa since Dickson has opening on Argonaut
Festival (1)	Near side between driveways has more space and is flatter	near side		No	Sun Metro is still deciding which option they want
Festival (2)	Preferred option but not enough room	far side		Yes	
Balboa		far side		No	
Camille/Fountain (1)	Fountain	far side		No	Right now this is preferred option, but survey both
Camille/Fountain (2)	Camille	near side		Yes	
Resler	In front of Albertson's, between first and second driveways	far side		Yes (almost)	
Westside Transit Terminal	Route 18 & 19 Stop				What else does core group want to add to this stop? No infrastructure improvements

INBOUND

Station as in AA	Proposed Location if Different From AA	Far, Near or Mid-block	Size of Station	Recomm ended in AA	Notes
Westside Transit Terminal	Route 18 & 19 Stop	NA		NA	What else does core group want to add to this stop? No infrastructure improvements
Resler		Near side		Yes	
Camille	survey from 6511 Mesa to near side of Camille			No	
Balboa		Far side		No	
Festival		Far side		Yes	
Argonaut		Near side		Yes	
Executive	start survey near side at 4305 Mesa in front of sleep center	Near side		No	
Mesita	In front of Las Palmas LifeCare Center - use existing bus shelter	Far side		No	between Kern and Alethea Park Dr
Glory Rd		Far side		Yes	
Hague	Existing bus stop in front of Providence ER	Near side		Yes	
Rio Grande	Existing bus stop built for BRT			Yes	
Franklin	Existing bus stop in front of museum	Mid-block		Yes	



Property Line of Existing
Downtown Transfer Center
(completed in Fall 2009)

275 ft

Station 1- DTC

— terminal property



Station 2 - Franklin Ave.

— 80 ft. proposed station

264 ft



Arizona Ave

N Oregon St

N Mesa St

E Rio Grande Ave

El Paso St

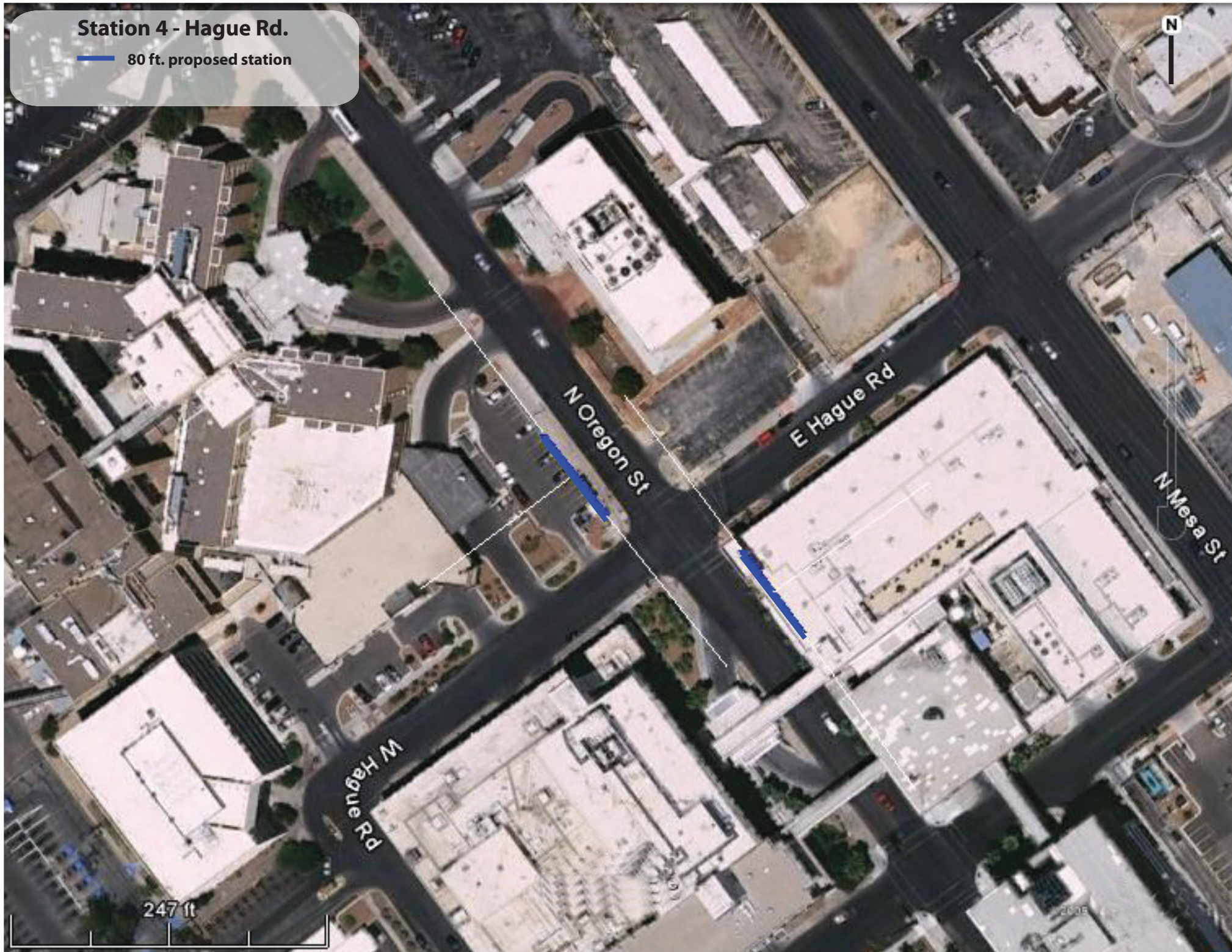
226 ft

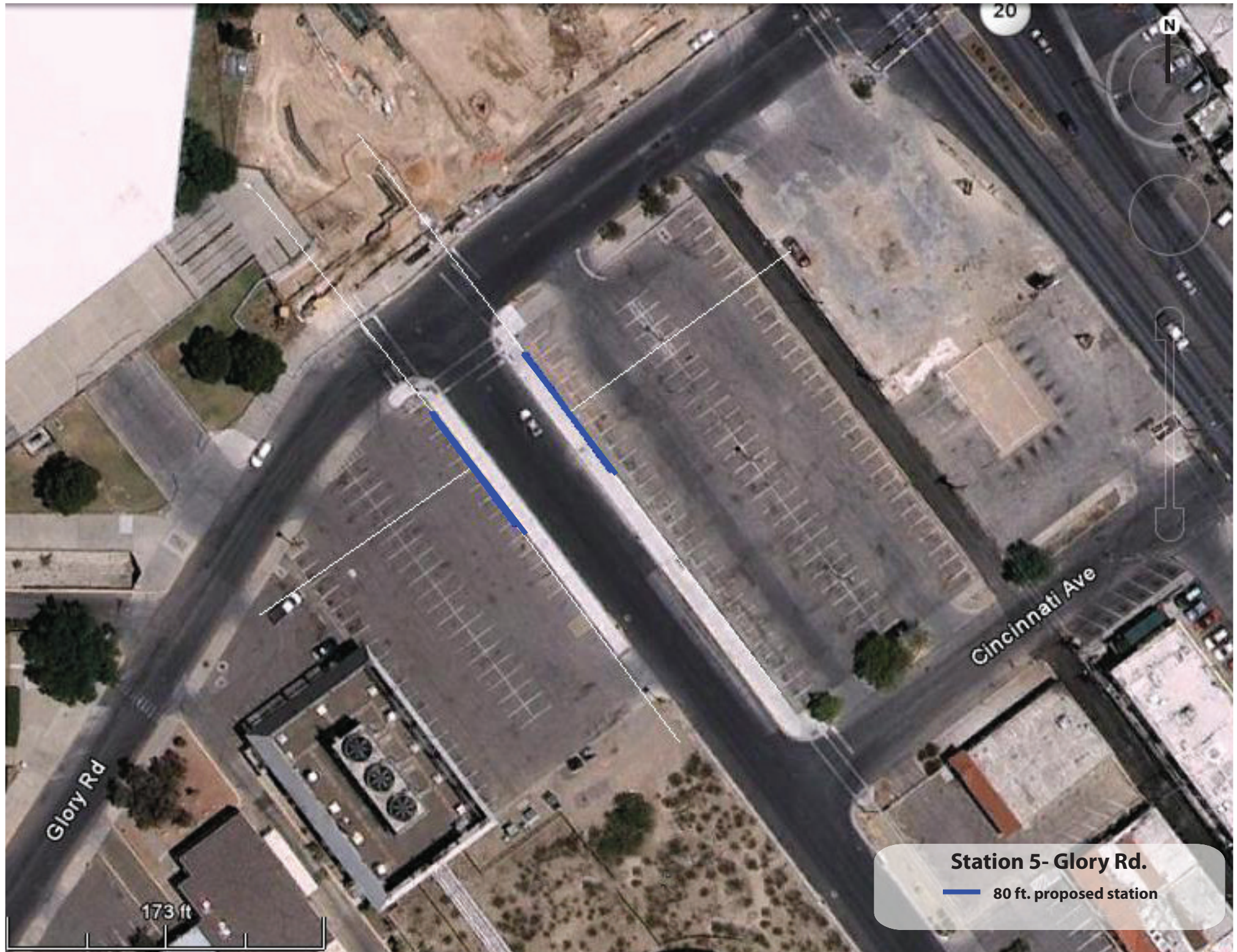
Station 3 - Rio Grande Ave.

— 80 ft. proposed station

Station 4 - Hague Rd.

80 ft. proposed station

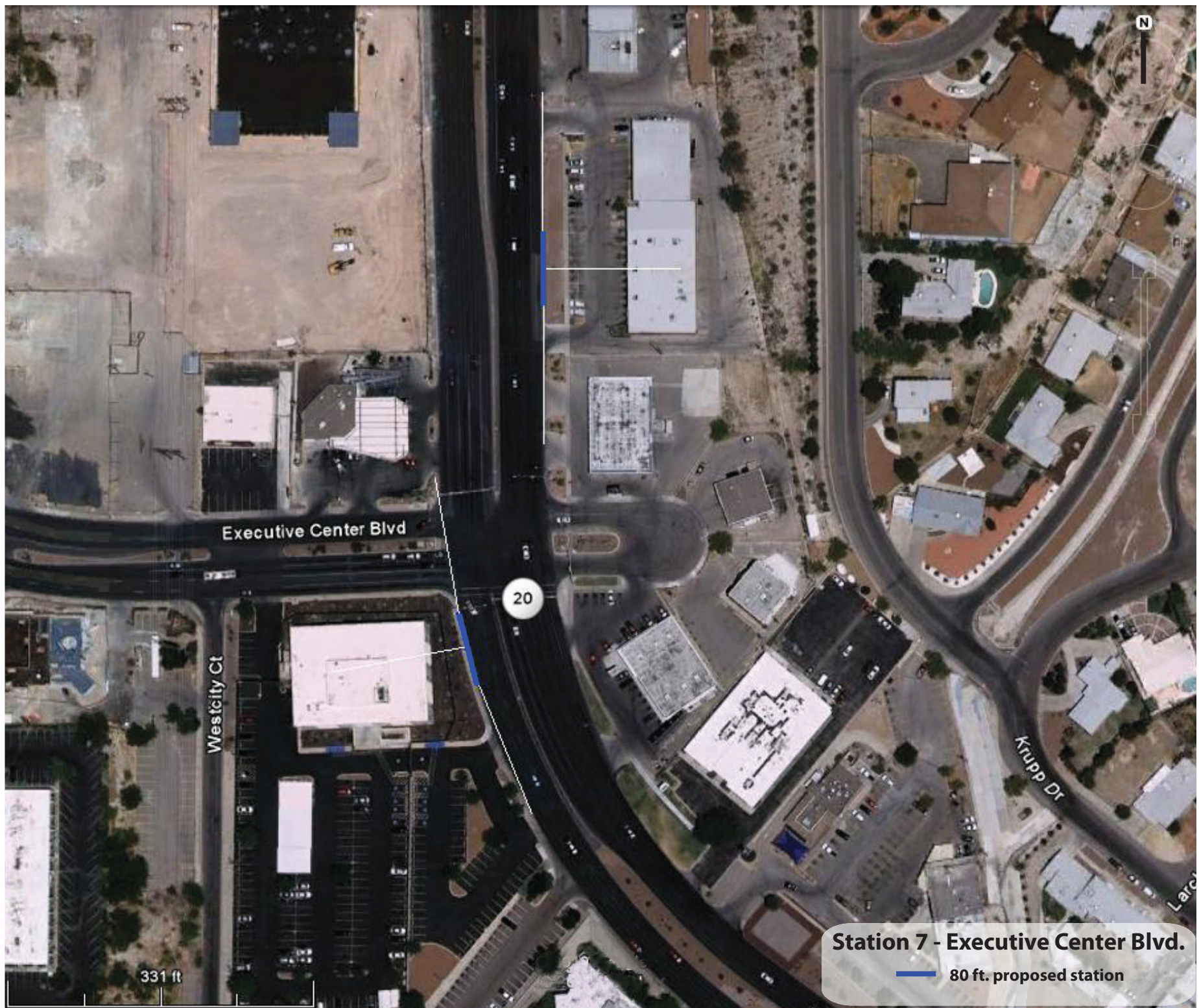






Station 6- Sun Bowl / Mesita Dr.

80 ft. proposed station



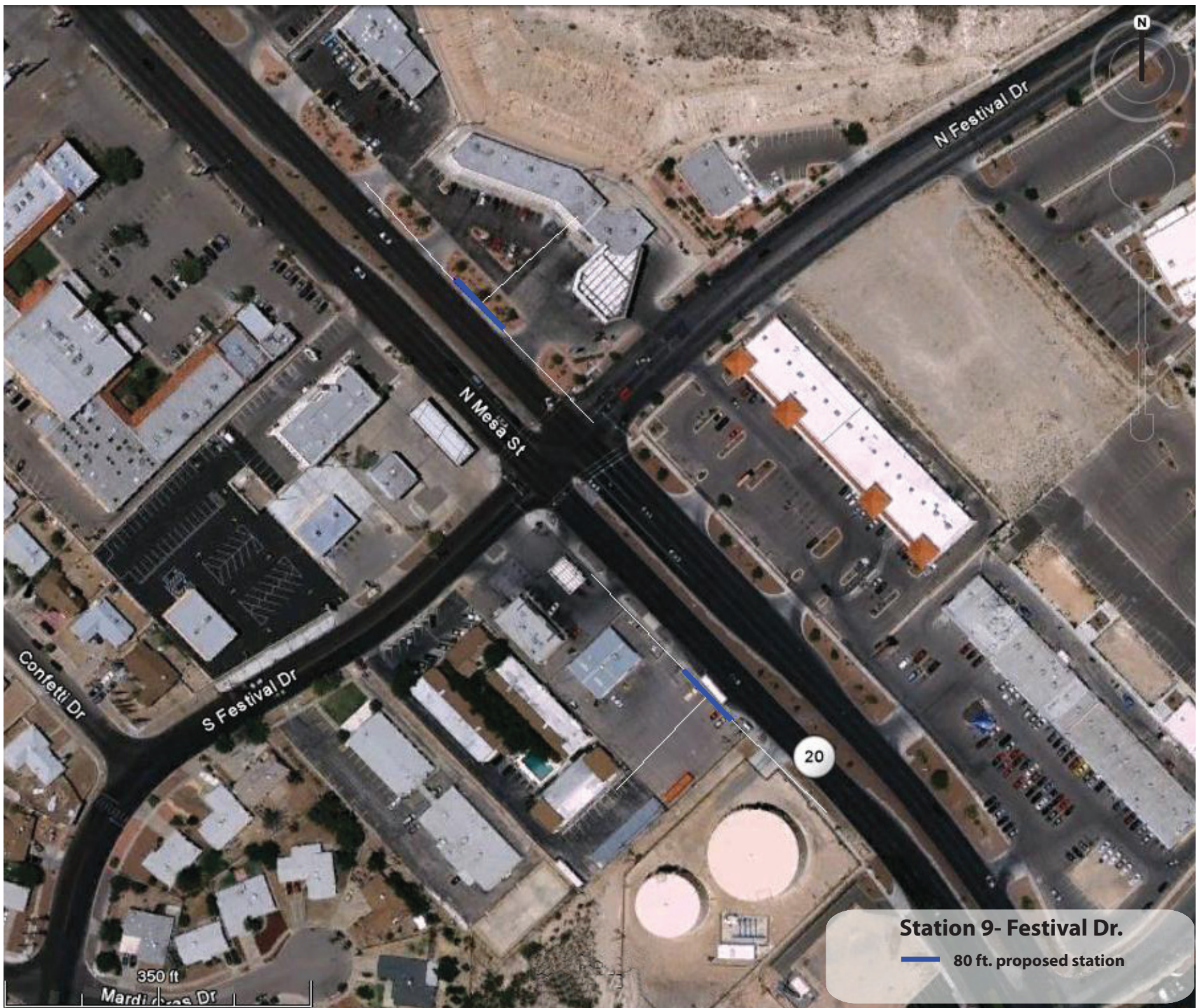
Station 7 - Executive Center Blvd.

— 80 ft. proposed station



Station 8 - Argonaut Dr.

— 80 ft. proposed station



Station 9- Festival Dr.

— 80 ft. proposed station



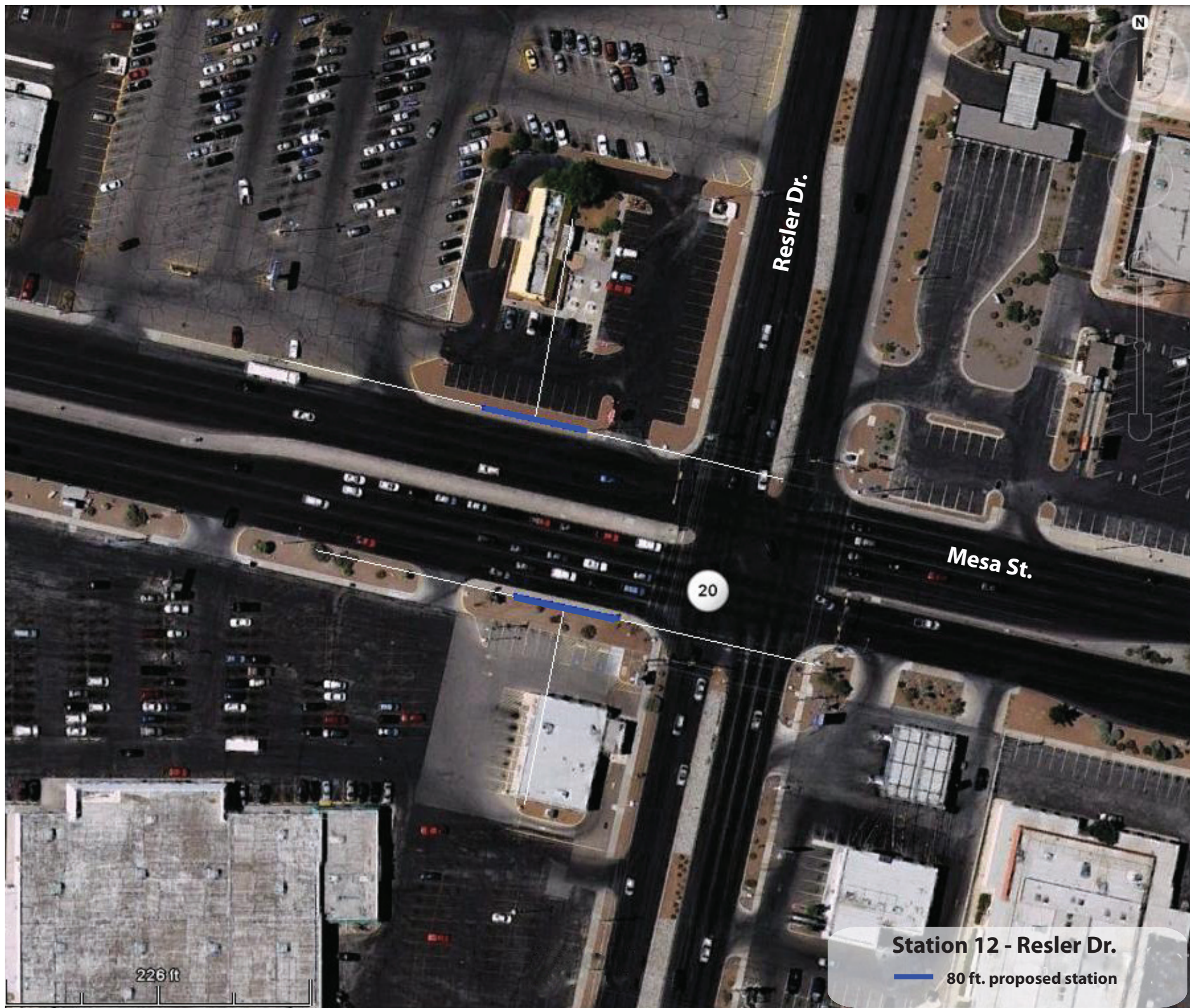
Station 10- Sunland Park Dr.

 80 ft. proposed station



Station 11 - Camille Dr.

— 80 ft. proposed station



Station 12 - Resler Dr.
80 ft. proposed station

EXHIBIT “B”

Mesa Corridor Rapid Transit System Public Art Project

Artist shall perform work according to the following schedule:

- Design Concept – 45 days after effective date and City’s notice to proceed.

- Design Development and Construction Documents – 30 days after City’s acceptance of the Design Concept and notice to proceed to Design Development phase.

-Fabrication - 140 days after receiving MCAD’s approval of the Final Design or Revised Design and MCAD's notice to proceed to Fabrication.

-Delivery Installation - 45 days after receiving the City’s final approval of the fabricated Artwork, as being in conformity with the Design and notice to proceed to Installation.

EXHIBIT “C”

Mesa Corridor Rapid Transit System Public Art Project

The Artist will develop a design that will influence and enhance various aspects of the infrastructure of the Mesa Corridor of the City’s Rapid Transit System to seamlessly integrate art into the architectural, branding logo, and landscape design. The total art aspect, to include all labor, materials and all other costs, must be equal in value to \$240,000.00 as determined by MCAD.

EXHIBIT “D”

BUDGET OUTLINE

Basic Items to Include in a Public Art Commission Budget

1. Artist’s fee - a value assigned to the idea and design
2. Labor
 - artist’s time (research, travel, meetings, community involvement activities, fabrication, installation, educational programming, documentation, etc.)
 - assistants/other labor for research, model making, fabrication, etc.
3. Consultants/Other People-Related Costs
 - structural engineer, other specialists like electrical engineers, lighting designers or plumbers
 - architects/landscape architects
 - historians, sociologists, urban anthropologists, etc.
 - lawyer
 - photographer
 - fabricator
4. Travel
 - airfare or automobile mileage
 - car rental
 - hotels
 - meals
 - other
5. Transportation
 - shipping of materials to fabrication site
 - shipping of work to installation site
6. Materials
 7. Site Preparation (may be covered through the commissioning body, pay attention to contract)
 - cleanup/removal
 - electrical or irrigation preparation
 - site survey (could include test drilling, GPS mapping, electronic detection)
 - grading/landscaping
8. Installation Needs/Equipment
 - rental of lifts, scaffolding, special equipment/materials etc.
 - truck rental
 - traffic barriers/off-duty police
 - storage rental
 - permits
 - lighting
9. Office/Studio Expenses

- rental, phone/fax/, utilities, supplies
10. Insurance
 - loss/theft/damage coverage to protect the supplies and fabricated parts prior to shipping
 - loss/theft/damage coverage during shipping (Inland Marine)
 - general liability for self, subcontractors and assistants
 - workers' compensation for assistants
 - automobile and any special insurance riders
 11. Contingency (10-20%)
 12. Maintenance/repair costs until transfer of ownership takes place (per contract)

TOTAL BUDGET	\$240,000.00
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